United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-7566

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

DANIEL H. OVERMYER and SHIRLEY OVERMYER,

Plaintiffs-Appellants,

—against—

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, THE STATE OF NEW YORK, THOMAS J. DELANEY, EDWARD A. PICHLER, and ANDREW R. TYLER,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF FOR DEFENDANT-APPELLEE FIDELITY AND DEPOSIT COMPANY OF MARYLAND

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Questions Presented

1. Did the Court below correctly dismiss the alleged Constitutional claims?

2. Did the Court below correctly dismiss the alleged damage claim?

Statement of the Case

The complaint herein contains two claims: that the enforcement of certain sections of the New York Judiciary Law is unconstitutional and that defendant, Fidelity and Deposit Company of Maryland, (hereinafter referred to as "F & D") perpetrated a fraud upon plaintiffs Daniel H. Overmyer and Shirley Overmyer (hereinafter collectively and individually referred to as "Overmyer"). The complaint seeks declaratory and injunctive relief, and damages in the sum of $100,260.00.

Upon motion of F & D, United States District Judge Milton Pollack, in the Southern District of New York, dismissed the complaint by an unreported memorandum and order dated October 18, 1976.

By stipulation and order dated September 7, 1976, defendants the State of New York, and Andrew R. Tyler, were granted an indefinite extension of time to answer, and are not parties to this appeal. Defendant Edward A. Pichler has not appeared, and defendant Thomas J. Delaney has requested that his name be removed from the docket of this appeal.

Statement of Facts

The only facts which are relevant to the issues before this Court are as follows.

There are two main claims alleged in the complaint in this action: a constitutional claim and a claim for fraud damages against F & D. The fraud claim arises out of certain alleged acts of F & D in Texas in 1973, in connection with an action in the Texas State Courts entitled "Eliot Realty, Inc. v. Overmyer Distribution Services, Inc." The constitutional claim arises out of an action in

the Supreme Court of the State of New York, entitled "Fidelity and Deposit Company of Maryland v. Daniel H. Overmyer, Shirley Overmyer, and Overmyer Distribution Services, Inc."

The Texas Action

In 1973, Eliot Realty, Inc. brought an action against Overmyer Distribution Services, Inc. to recover possession of real property, and recovered a judgment awarding the relief sought. Overmyer Distribution Services applied to F & D, which in reliance upon a general agreement of indemnity executed by Shirley and Daniel H. Overmyer, and upon the application of Overmyer Distribution Services, executed an appeal bond, and Overmyer Distribution Services thereafter perfected its appeal to the County Court of Dallas County, Texas. That Court affirmed the judgment below (A81), and also awarded to Eliot Realty, Inc., the value of the continued occupancy of the premises during the appeal in the sum of $28,092.25 (A81). The County Court further directed that execution be had against Overmyer Distribution Services, Inc., and F & D.

Thereafter, on December 7, 1973, F & D paid to Eliot Realty, Inc., the sum of $25,535.85, in discharge of its liability on said bond and in satisfaction of the judgment rendered against it.

The New York Action

F & D thereafter commenced an action for indemnity in the Supreme Court of the State of New York, County of New York against Daniel H. Overmyer, Shirley Overmyer and Overmyer Distribution Services. It is quite apparent from the complaint (A2-A16) that the facts alleged in this action, in paragraphs 12-18 of the complaint herein, arise from the same facts and circumstances al-

leged in the complaint in the New York Supreme Court action.

In the New York action the defendant moved to dismiss the plaintiff's complaint and the plaintiff cross-moved for summary judgment. As evidenced by the affidavit of the defendant's attorney, Stanley Alex Schwartz (A91-A98), sworn to the 23rd day of July, 1974, defendant's attorney specifically challenged the "good faith" of the plaintiff and the payment made by the plaintiff, alleging that there was an issue of fact "as to whether the surety company properly paid over to the party" (A95).

The Supreme Court of New York per Justice Nathaniel Helman held that the defendant's argument was clearly specious and in an opinion dated October, 1974 (A99-A101), the Court stated in pertinent part:

> "No question exists as to plaintiff's obligation when it is named as a judgment debtor and execution is granted against it. This is not a case where it was solely the surety. In any event, defendants contracted to indemnify upon payment, whether plaintiff was liable for that payment or not. Defendants have no defense against their contract obligation, and their attorney cannot create one by "surmise, conjecture and suspicion" (Shapiro v. Health Insurance Plan of Greater New York, 7 N Y 2d 56)."

An order of the Supreme Court of New York was made on November 14, 1975, denying the defendant's motion to dismiss the complaint and granting plaintiff's cross-motion for summary judgment (A102-A105).

On November 19, 1974 pursuant to an order of Justice Nathaniel T. Helman granting it summary judgment, F & D entered judgment against Daniel H. Overmyer,

Shirley Overmyer and Overmyer Distribution Services, Inc., jointly and severally for the sum of $27,973.83.

Overmyer appealed from the judgment entered November 19, 1974, to the Appellate Division, First Department where the judgment was affirmed unanimously on May 20, 1975. Overmyer moved in the Appellate Division for a stay of enforcement which motion was denied, and then moved to reargue the motion for a stay, which was also denied.

Overmyer moved for leave to appeal to the Court of Appeals, first in the Appellate Division and then in the Court of Appeals, both of which motions were denied.

Overmyer then applied to the United States Supreme Court for an extension of time to petition for a writ of certiorari, which application was denied. Overmyer has therefore exhausted his appeals from the judgment.

During the pendency of those appeals, Overmyer also moved in the Supreme Court, New York County, for a stay of enforcement pending the appeal, and to vacate the judgment upon the newly discovered evidence, to wit that the defendants were now claiming that they were not certain that they signed the indemnity agreement. Both of these motions were denied.

After the entry of judgment on November 19, 1974, a subpoena to examine Daniel H. Overmyer as to his assets and earnings was duly prepared and served upon him, requiring his attendance on January 17, 1975 at the offices of this firm. At the request of Overmyer's attorneys, his appearance was adjourned to March 17, 1975. At that time, Overmyer failed to appear for examination and his default was duly noted on the subpoena.

Judgment creditor then brought on a motion on notice to punish Overmyer for contempt, for failure to obey a

lawful subpoena. Notice of this motion was personally served upon Overmyer. On the return date of the motion, May 6, 1975, Overmyer appeared by his attorneys and submitted papers in opposition to the motion. Justice George Postel granted that motion and found Overmyer in contempt of Court unless Overmyer appears for an examination on June 12, 1975. A copy of Justice Postel's order with notice of entry was duly served upon Overmyer's attorneys. On June 12, 1975 Overmyer failed to appear at the appointed time and place. On September 9, 1975, this firm served notice on Overmyer's attorneys that a Contempt Order would be submitted to Justice Postel on September 15, 1975. On September 30, 1975 Justice Postel signed an order adjudging Overmyer to be in contempt of Court and imposed a fine of $260.00, but directed that the Contempt Order be purged and the fine remitted if Overmyer appears for examination on October 29, 1975. A copy of the Contempt Order with notice of entry was duly served by mail upon Overmyer and his attorneys.

Overmyer demonstrated his receipt of the Contempt Order and also his contempt for the judicially imposed fine by making regular payments in the sum of $25.00 per month commencing on October 16, 1975 until the amount of the fine was paid in full. On October 29, 1975 Overmyer failed to appear at the appointed time and place.

On January 21, 1976, Justice Irving Kirschenbaum signed an order to show cause directing Overmyer to show cause on February 3, 1976 "why an order should not be made directing the Sheriff of any County of the State of New York wherein Daniel H. Overmyer may be found to apprehend said Daniel H. Overmyer, the judgment debtor and compel him to appear at Special Term Part II for examination under oath by the judgment creditor." Over-

myer's attorneys appeared and submitted papers in opposition to this motion. However, the motion was granted. On June 2, 1976, pursuant to a decision dated April 30, 1976, an order was made adjudging Overmyer in contempt of Court directing him to appear for examination and directing that "the Sheriff of any County to whom a certified copy of this order shall be delivered, shall forthwith, on receipt thereof, and without further process, apprehend the said Daniel H. Overmyer, the judgment debtor herein, and compel him to appear at a Special Term, Part II of this Court, at the Courthouse, 60 Centre Street, New York, New York, for examination under oath by the judgment creditor herein at 10:00 A.M. on June 10, 1976." A copy of this order was duly served upon Overmyer and his attorneys.

On June 7, 1976 Overmyer, by his attorneys, obtained a stay of the enforcement of the judgment and an order directing F & D to show cause why Overmyer should not be granted leave to reargue the prior motion. This office appeared at the appointed time and after hearing the arguments of both sides, Justice Andrew Tyler denied Overmyer's motion for leave to reargue, by a decision dated June 23, 1976. By order dated August 2, 1976, Justice Tyler vacated the stay imposed on June 7, 1976 and again directed that Overmyer appear for examination and further directed that "the sheriff of any county to whom a certified copy of this order shall be delivered, shall forthwith, on receipt thereof, and without further process, apprehend the said Daniel H. Overmyer, the judgment debtor herein, and compel him to appear at a Special Term Part II of this Court, at the Courthouse, 60 Centre Street, New York, New York, for an examination under oath by judgment creditor herein, at 10:00 a.m. on August 31, 1976, or any court day thereafter until the said Daniel

H. Overmyer shall actually be examined under oath by judgment creditor herein."

Shortly thereafter, Overmyer commenced this action in the District Court.

Response to Overmyer's Statement of Facts

The alleged facts set forth in the plaintiffs-appellants' brief herein are conspicuously devoid of support in the Record on Appeal and the Appendix. In tacit acknowledgement of this, there appears not one reference in the Statement of Facts to the Record or Appendix. In the Court below, Overmyer submitted no affidavits in support of the frivolous and ridiculous allegations of his complaint. The unsupported statement of Overmyer's knowledge, ignorance, intentions, fears, and suspicions should therefore be stricken from the appeal.

Further, the appellant makes the absurd argument that F & D committed acts of bribery and deceit just for the privilege of paying this Texas judgment and incurring the enormous expense and frustration in seeking to recover the payment from the appellant. Rather than having made a "voluntary payment" to Eliot Realty, plaintiff in the Texas action, as a consequence of its suretyship, F & D was threatened with a levy against *its* assets by Eliot Realty, and suffered the entry of judgment against it (A81).

F & D takes this opportunity to go beyond the record, to categorically deny any impropriety or fraud in its handling of the Texas action, or its prosecution of the New York action.

In addition, F & D has never moved to have Overmyer arrested, or imprisoned, but only to compel him to appear

to answer questions, pursuant to a lawful subpoena and several lawful orders of the Supreme Court of the State of New York.

Finally, the Overmyer Statement of Facts attempts to confuse the two separate claims in this case: (1) whether the State of New York may compel compliance with a lawful subpoena and orders of the court, after contempt of those legal processes has been shown, admitted and adjudicated on notice and after hearing from the contemnor; and (2) whether F & D perpetrated a fraud upon Overmyer. These two claims must be separated for proper analysis.

POINT I

The Court below correctly dismissed the alleged constitutional claims.

A. Constitutional argument.

Overmyer's alleged constitutional claim is that he is threatened with incarceration by virtue of the unconstitutional New York Judiciary Law, Article 19. Reliance is placed principally on *Vail* v. *Quinlan*, 406 F. Supp. 951 (S.D.N.Y. 1976). It is respectfully submitted that this reliance is misplaced, as the facts and legal arguments in *Vail* are clearly distinguishable from Overmyer. Therefore, Judge Pollack's decision was correct and merits affirmance.

In this action, Overmyer sought permanent and preliminary injunctions (A15-A16) restraining the enforcement of an order of the Supreme Court of the State of New York, by Justice Andrew R. Tyler, dated August 2, 1976, which provided in pertinent part:

> ". . . Daniel H. Overmyer . . . be and he hereby is directed . . . to appear at a Special Term Part II of this Court, at the Courthouse, 60 Centre Street, New York, New York, for examination under oath by judgment creditor herein, at 10:00 am. on August 31, 1976, and it is further
>
> "ORDERED, that the Sheriff of any county to whom a certified copy of this order shall be delivered, shall forthwith, on receipt thereof, and without further process, apprehend the said Daniel H. Overmyer, the judgment debtor herein, and compel him to appear at a Special Term, Part II of this Court, at the Courthouse, 60 Centre Street, New York, New York, for examination under oath by judgment creditor herein, at 10:00 a.m. on August 31, 1976, or any court day thereafter until the said Daniel H. Overmyer shall actually be examined under oath by judgment creditor herein."

Overmyer claimed that he was entitled to this relief under *Vail* v. *Quinlan*, 406 F. Supp. 951 (S.D.N.Y. 1976) a class action, in which the enforcement of New York Judiciary Law, Article 19 was enjoined as unconstitutional. Logically, plaintiff was either a member of the class of plaintiffs in *Vail*, or he was not such a member. In either case, he was not entitled to the relief sought.

If Overmyer was within the class of plaintiffs represented by Harry Vail, then enforcement of Justice Tyler's order may proceed. Overmyer had no greater right than the other members of the class, against whom enforcement may proceed by virtue of the order of the Supreme Court of the United States by Justice Thurgood Marshall, dated February 12, 1976 (A55). By this order the enforcement of the injunction granted by the District Court was stayed pending the determination of the appeal. As a result, if

Overmyer was a member of the class of plaintiffs in *Vail*, he was not entitled to any relief in the District Court, pending determination of the appeal in *Vail*.

If Overmyer was not a member of the class of plaintiffs in *Vail*, then he was required to prove his entitlement to injunctive relief by reference to applicable law. Judge Pollack correctly found no such applicable law, and that *Vail* provided no support for Overmyer's claims. It is clear that the operative facts in this case are substantially dissimilar to the facts in *Vail*.

The plaintiffs in *Vail* at the inception of the lawsuit, moved to convene a three judge court pursuant to 28 USC §§ 2281 and 2284. Judge Cannella granted this motion, upon a finding that the constitutional issues were substantial. 387 F. Supp. 630 (SDNY 1975). Judge Cannella described the class of plaintiffs who raised substantial constitutional questions regarding the New York procedure for enforcement of judgments as follows:

> "Each plaintiff (as well as the proposed plaintiff-intervenor) is a judgment debtor who has failed to respond to or comply with a post-judgment discovery subpoena. Each has been served with an order to show cause requiring that he demonstrate why he should not be adjudged in contempt of court for failure to obey such subpoena and each has failed to appear at the show cause hearing. Accordingly, each was adjudged in contempt of court and, upon failure to pay the fine specified by the County Court in its contempt order, has been incarcerated or subjected to an immediate threat of incarceration pursuant to an ex parte commitment order issued in compliance with § 756 of the Judiciary Law."

The facts in *Vail*, as recited by Judge Cannella, were crucial to the three judge court's determination of unconstitutionality, and since the most compelling facts were absent from the case at bar, Overmyer was not entitled to relief: (1) Overmyer appeared by attorney, in response to the order to show cause, and contested the issue of contempt. (2) Overmyer was found in contempt of court after this hearing. (3) Overmyer paid the fine of $260.00 specified by the Court; Justice Tyler's order was not based upon Overmyer's failure to pay this fine, but upon his failure to comply with a lawful subpoena and two court orders. (4) Overmyer was and is not subject to incarceration, but only to being compelled to testify. (5) The order compelling his appearance to testify was obtained on notice, after hearing and rehearing, not *ex parte*. Because of the factual dissimilarity of *Vail* and Overmyer, no relief to Overmyer was warranted.

The principal legal bases of the *Vail* decision were three: (1) That the statutes provided for punishment for civil contempt rather than coercion to enforce the court orders. (2) That the statutory scheme did not require that sufficient notice be given to the contemnor of the possibility of incarceration, and (3) That the plaintiffs were deprived of their right to counsel. None of these three bases applies herein to support plaintiff's claims for relief.

The Court in *Vail* stated:

> "Finally, although it is well established that judicial sanctions in civil contempt are proper to compensate the complainant for losses sustained or to coerce compliance with a court's order, the sanctions imposed under the challenged statutes are neither remedial nor coercive, but punitive."

It is clear that Justice Tyler's order is coercive and not punitive. It orders that Overmyer appear for examination (pursuant to subpoena and subsequent court orders) and directs the Sheriff to compel him to appear for such examination. This is clearly remedial in nature and there is no punishment involved.

In *United States* v. *United Mine Workers of America*, 330 U.S. 258 (1947) cited by the Court in *Vail*, a civil (and criminal) contempt proceeding, the Supreme Court held that it was a proper use of contempt proceedings to coerce compliance with a court order, in that case an injunction against a coal miners' strike (330 U.S. at 303-304). Justice Douglas, in his concurring opinion, discussed the long history of contempt proceedings, and observed "Where the court exercises such coercive power, however, for the purpose of compelling future obedience, those imprisoned carry the keys of their prison in their own pockets" (330 U.S. at 331). This is true also of Overmyer: he need only submit to examination under oath, for his contempt to be purged.

Thus, Justice Tyler's order which is plainly aimed at coercing plaintiff to comply with the subpoena and subsequent court orders, does not place an unconstitutional burden upon plaintiff, and no injunction is warranted.

Unlike the plaintiffs in *Vail*, plaintiff Overmyer received effective notice at every stage in the contempt proceeding and actually knew at all times of the sanctions that could be imposed for contempt. Despite this notice and knowledge, Overmyer continued to ignore the subpoena and court orders and wilfully and contumaciously refused to appear for examination. Justice Tyler, in his memorandum decision dated June 23, 1976, stated:

> "This Court finds the litany of evasion and noncompliance in which the defendant judgment debtor

> has engaged to be absolutely incredible. The utter disrespect which Overmyer has shown, not just for the prior order of this Court, but for the entire system of jurisprudence by which this Court and this society operates is reprehensible."

Justice Tyler's above stated opinion was upon a motion, made *on notice* to Overmyer and his attorneys, to compel him to appear for examination. Therefore, the claim of lack of notice and lack of due process, upheld in *Vail*, is irrelevant, because Overmyer was given effective notice at every step.

Finally, unlike the plaintiffs in *Vail*, Overmyer may not claim that the contempt proceedings deprived him of his right to counsel. Overmyer was represented in the Supreme Court action by Easton & Echtman, P.C., his attorneys herein, who appeared and opposed every application made by F & D culminating in Justice Tyler's order of August 2, 1976.

In summary, none of the factual or legal elements which compelled the Court in *Vail* to enjoin the contempt proceedings therein, apply to warrant any relief to Overmyer. For that reason, Judge Pollack's dismissal of the alleged constitutional claim was correct.

B. *Res judicata.*

No reversal of Judge Pollack's decision in the Court below is warranted because of the above-stated lack of constitutional merit, and because these parties have already litigated these constitutional issues in the Supreme Court of the State of New York. Justice Tyler determined the constitutional claims adversely to Overmyer, and no direct attack on his decision has been sustained. Overmyer may not be heard herein to collaterally attack Justice Tyler's determination.

In the Supreme Court, in opposition to F & D's motion for the order challenged herein, Overmyer's attorney submitted an affirmation (A57-A59) which cited and explained the applicability of *Vail* v. *Quinlan,* and urged that the court deny F & D's motion. Justice Tyler granted the motion over this constitutional objection.

Overmyer nevertheless seeks to again "have their day in court to litigate the constitutional issues herein," upon the ground that their (admitted) assertion of a constitutional claim based on *Vail* v. *Quinlan,* in the Supreme Court and the rejection of this claim by (defendant) Justice Tyler, is not a bar to assertion of the claim in Federal Court because it was not determined "on the merits." First, this is not true: Justice Tyler rejected the constitutional claim on the merits. Second, plaintiffs are barred in any event from relitigating this claim by the principle of *res judicata.*

In his memorandum decision dated May 24, 1976, Justice Tyler granted F & D's motion, and directed the Sheriff to apprehend Overmyer and compel him to appear for examination. Justice Tyler stated "It is the contention of Overmyer that the *Vail* decision precludes the grant of the instant motion, and it must therefore be denied as a matter of law." Justice Tyler then cited *Walker* v. *Walker,* — AD2d —, 381 NYS2d 311 (2d Dept., 1976) and held with respect to *Vail,* "nor does it apply to the case at bar."

In *Walker, supra,* the contemnor sought to avoid imprisonment, based on *Vail.* The Appellate Division observed:

> "Here, appellant received all of the due process rights which were denied to the plaintiff in Vail. He had been previously imprisoned for violation of the alimony judgment, he was served with proper

> process bringing on this proceeding and he was represented by counsel who appeared and argued on his behalf. Thus, all of the alleged infirmities in the statutes held unconstitutional in Vail are not here applicable. The court there was dealing with a defaulting, impecunious debtor who did not appear at the statutorily guaranteed hearing, who was without any knowledge of the possible consequences to him and who had no counsel. The facts here are the opposite."

Thus, it is clear that Justice Tyler reached the same conclusion as the Court reached in *Walker,* that Overmyer was not protected by *Vail,* because of differences in the factual circumstances. Therefore, this determination of Overmyer's constitutional claims was based on consideration of the facts and the law, and was on the merits, conclusively binding Overmyer, and barring the reassertion of the constitutional claims in this action.

The purpose of the principles of collateral estoppel and *res judicata,* is to safeguard the finality of litigated determinations, and to protect parties from repetitive and vexatious litigation. Plaintiff and F & D have already litigated the fact of Overmyer's contempt, and the proper remedy therefor, and this litigation has resulted in a final order reinstated after reargument, from which no appeal has been taken. As set forth above, plaintiffs raised, and the court decided the constitutional issue. Since the same question of constitutionality was at issue and was determined against Overmyer in state Court, *res judicata* bars the relitigation of that issue in Federal Court. *Thistlethwaite* v. *City of New York,* 362 F. Supp. 88 (S.D.N.Y. 1973), *aff'd* 497 F2d 339 (2d Cir.), *cert. den.* 419 U.S. 1093 (1974). See also Judge Pollack's discussion of this issue (A139-A140).

Therefore, Overmyer's alleged constitutional claim is barred by *res judicata* as well as its lack of merit, and Judge Pollack's dismissal was correct and merits affirmance.

POINT II

The Court below correctly dismissed the alleged damage claims.

It is respectfully submitted that Judge Pollack's dismissal of Overmyer's claim for damages suffered as a result of the alleged fraud of F & D, was correct because the claim was abandoned, because there is no subject matter jurisdiction of the claim in Federal Court, and because the claim is barred by the operation of *res judicata*.

A. Abandonment.

Overmyer's claim for fraud damages set forth in the complaint herein as a Fifth Cause of Action (A14-A15) was not urged by Overmyer before Judge Pollack. Therefore, the dismissal of the claim was proper, and the claim may not be renewed herein.

Examination of the Appendix herein as well as the Record, reveals that, at no time, after the initial pleading, did Overmyer support the claim for damages, or request that the damage claim be considered by the Court, or oppose F & D's motion to dismiss the damage claim. Although Overmyer's brief on this appeal seeks to present the facts of the damage claim in the context of a constitutional claim, no discussion of the damage issue was required or appropriate in the papers concerning the motion for a preliminary injunction in the district court (A23-A36, A60-A71). The affidavit of Arthur Lambert (A74-

A80) and the exhibts annexed thereto (A81-A85) in support of F & D's motion to dismiss the complaint, are largely addressed to the damage claims, and set forth the basis for the argument that *res judicata* bars relitigation of the damage claims. Point I and much of Point II of F & D's Memorandum of Law in Support of Motion to Dismiss (A106-A112) is also directed toward dismissal of the damage claim. Overmyer's memorandum of law (A114-A120) submitted in opposition to the motion to dismiss does not argue that the damage claim should be sustained. In fact, Overmyer concludes (A120): "it is respectfully submitted that defendant Fidelity's motion to dismiss be denied and that plaintiffs' have their day in court *to litigate the constitutional issues herein*" (emphasis added). It must be implied from the foregoing that Overmyer abandoned the claim for damages in the district court. Thus the dismissal of the claim for damages was proper and correct, and should not be reversed on this appeal.

B. Lack of subject matter jurisdiction.

The claim for damages by plaintiffs against F & D relates exclusively to the conduct of F & D in an action in Texas and in a subsequent action in New York. (Complaint, Paragraphs 12-18, A5-A9). No diversity of citizenship is alleged (A3), nor is any federal question presented by this claim. A Federal Court therefore has no jurisdiction to adjudicate this claim, except as an appendage to a claim over which the Federal Court *has* subject matter jurisdiction. It is respectfully submitted that no pendent jurisdiction exists, and that Judge Pollack's dismissal of the damage claim, therefore should be affirmed.

Assuming for the purposes of argument that Overmyer's alleged constitutional claim presents a federal question, the claim for damages is not sufficiently related to

the constitutional claim to be within the Federal Court's subject matter jurisdiction. The constitutional claim arises from plaintiff Daniel H. Overmyer's contempt of the Supreme Court of the State of New York, and the orders and lawful processes thereof. All of the facts relating to the constitutional claim occurred in New York, in or after November, 1974, when a lawful subpoena to Overmyer was issued out of the Supreme Court of the State of New York. The alleged basis of the claim for damages is in conduct of F & D in Texas, in 1973 and in New York, prior to November, 1974. Thus there are no material facts common to the two claims.

The standard by which Federal Courts judge whether pendent jurisdiction exists is whether the two claims "derive from a common nucleus of operative fact." *United Mine Workers of America* v. *Gibbs,* 383 US 715 (1966). It is clear from the foregoing that plaintiffs' damage claim hereunder arises from facts which are entirely separate from the facts relating to plaintiff's constitutional claim. For that reason, the claim for damages against F & D were correctly dismissed for lack of subject matter jurisdiction.

C. The bar of *res judicata.*

An additional, independent ground for affirmance of Judge Pollack's dismissal of the damage claim, is that the damage claim was barred by the principle of *res judicata.* The same parties to the damage claim, F & D and Overmyer, were parties in a prior action entitled: "Fidelity and Deposit Company of Maryland v. Daniel H. Overmyer, Shirley Overmyer, and Overmyer Distribution Services, Inc." which was fully and fairly litigated, and which resulted in a conclusive and final judgment in favor of F & D and against Overmyer. The damage claims asserted herein are merged into that judgment.

In this action, Overmyer merely rephrases the claims that F & D paid Eliot Realty, Inc. in bad faith, which was fully litigated and determined in the Supreme Court, New York County. This defense which was found to be without merit, was recast herein as a claim for damages, seeking to reverse the liability and judgment lawfully imposed upon Overmyer. This action is no more than a collateral attack on the judgment, after all direct attacks by way of appeals and by motions to vacate have failed. Therefore, this claim was correctly dismissed.

In *Saylor* v. *Lindsley*, 391 F.2d 965 (2d Cir. 1968). Judge Anderson described the elements of *res judicata* as follows:

> "The general rule of res judicata is that a valid, final judgment, rendered on the merits, constitutes an absolute bar to a subsequent action between the same parties, or those in privity with them, upon the same claim or demand. *It operates to bind the parties both as to issues actually litigated and determined in the first suit, and as to those grounds or issues which might have been, but were not, actually raised and decided in that action.* The first judgment, when final and on the merits, thus puts an end to the whole cause of action. See Cromwell v. County of Sac, 94 U.S. 351, 24 L.Ed. 195 (1877); Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597, 68 S.Ct. 715 92 L.Ed. 898 (1948); 1B Moore's Federal Practice ¶0.405 [1] (1965 ed.).
>
> "The requirement that a judgment, to be res judicata, must be rendered 'on the merits' guarantees to every plaintiff the right once to be heard on the substance of his claim." (Emphasis added) 391 F.2d at 968.

Each aspect of this test is met here.

The Supreme Court has observed that the principles of *res judicata* "as founded upon the generally recognized public policy that there must be some end to litigation and that when one appears in Court to present his case, is fully heard, and the contested issues decided against him, he may not later review the litigation in another court" *Heiser* v. *Woodruff*, 327 U.S. 726, 733 (1946).

Because the issues in the damage claim were conclusively determined against Overmyer prior to the institution of this suit, the dismissal of the damage claim was correct, and should be affirmed.

POINT III

Appellant's brief raises no grounds for reversal of the Court below.

Overmyer's brief on this appeal discussed a number of constitutional issues which are totally foreign to the facts in the record herein. By attempting to confuse and intermingle the constitutional and damage claims, Overmyer attempts to evoke the sympathy of this court, which effort is misplaced. The brief fails to raise any basis for the reversal of Judge Pollack's sound and well reasoned opinion.

The argument that the New York Judiciary Law Sections challenged by Overmyer are unconstitutional on their face is irrelevant. To the extent that *Vail* v. *Quinlan*, 406 F. Supp. 951 (1975) is correct, the procedure provided by those statutes which does not require notice prior to incarceration, may be unconstitutional. However, F & D employed a different procedure, acted under a different statute, and does not seek to incarcerate Over-

myer, therefore, Overmyer will not be heard to raise any constitutional objection herein.

The procedure employed by F & D in enforcing a lawful subpoena, gave actual notice to Overmyer at every stage. In fact Overmyer appeared and opposed the original motion to hold him in contempt. F & D thereafter made a motion, on notice to Overmyer, for an order directing the Sheriff to compel Overmyer to appear for examination, which motion was granted over Overmyer's objection. Overmyer then sought and obtained reargument, after which the prior order was reinstated. The procedure described in *Vail, supra* allows an order to incarcerate the debtor to be granted *ex parte*, but F & D made the latest motion on notice. Second, as correctly observed by Judge Pollack, New York CPLR 2308, which provides in pertinent part, "A court may issue a warrant directing a Sheriff to bring the witness into court" was the basis of F & D's motion herein, not the Judiciary Law. Finally, the order challenged herein did not provide for incarceration, only compulsion to appear to answer questions under oath, pursuant to a lawful subpoena, and orders of the Court. Thus, whether or not the statutory scheme provided by the Judiciary Law is constitutional, the proceedings against Overmyer in the Supreme Court of the State of New York are clearly constitutional.

Overmyer's second argument on this appeal, entitled "The New York Statutes are unconstitutional as applied" to the extent it is intelligible sets forth two propositions: that F & D by its alleged fraud in Texas, denied Overmyer due process of law; and that Overmyer was denied the opportunity to contest his "incarceration." These propositions are irrelevant to the facts of this case, are illogical on their face, and are simply untrue. In this action, the fraud claim is separate from the constitutional claim, and no injunction against fraud is sought, only against the

enforcement of the contempt laws. Second the fraud claim is based on the improbable premise that F & D engaged in acts of fraud and overreaching, in order to enable itself to pay approximately $25,000 to its customer's adversary, in return for the right to sue its customer for an equal amount. This is nonsensical. Finally, Overmyer had at least three opportunities to show that he should not be held in contempt, and at each opportunity he was actually heard: on May 6, 1975 before Justice George Postel; in early 1976 before Justice Andrew Tyler, and in June, 1976, upon reargument before Justice Tyler. Thus Overmyer's second point cannot be the basis for reversal herein.

Overmyer's third argument, that his constitutional claims are substantial, is incorrect. The constitutional claim may be aptly characterized as "essentially fictitious"; "wholly insubstantial"; "obviously frivolous"; "obviously without merit." *Goosby* v. *Osser*, 409 U.S. 512 (1973). Judge Pollack, below, stated "Plaintiffs do not satisfy the criteria for injunctive relief . . . by raising a semantic semblance to an irrelevant constitutional question" (A138). Thus no substantial constitutional issue is present in this case.

Overmyer's fourth argument, regarding his individual right to an injunction does not require a reply. The fifth and sixth arguments regarding *res judicata* and collateral estoppel are discussed at length above. Overmyer's last argument, that a preliminary injunction is warranted, is ripe for consideration only upon reversal, and is not, as such, a basis for reversal.

In summary, the arguments and points contained in Overmyer's brief on this appeal, do not amount to cause for reversal of the Court below, and Judge Pollack's order should be affirmed.

CONCLUSION

For all of the foregoing reasons, upon the record and the applicable law, the memorandum and order of Judge Pollack, dated October 18, 1976 should be affirmed, with costs to Fidelity and Deposit of Maryland, defendant-appellee.

Respectfully submitted,

HENDLER & MURRAY
Attorneys for Defendant-Appellee Fidelity and Deposit Company of Maryland

Of Counsel:

ARTHUR LAMBERT
JASON WALLACH

375—Affidavit of Service The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

NEW YORK SUPREME COURT APPELLATE DIVISION DEPARTMENT

THE UNITED STATES COURT OF APPEALS

OVERMYER

VS

FIDELITY AND DEI ST

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

BERNARD S. GREENBERG being duly sworn,

deposes and says that he is over the age of 21 years and resides at 162 E 7th St NY. NY

That on the 7th day of February, 1977 at

he served the annexed brief for defendant-appellee Fidelity & Deposit upon

Easton & Echtman, 6. East 39th Street, NY, NY

in this action, by delivering to and leaving with said attorneys

two true cop thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 7th day of February, 1977

Bernard S. Greenberg

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977

76-7566

United States Court of Appeals

FOR THE SECOND CIRCUIT

DANIEL H. OVERMYER and SHIRLEY OVERMYER,

Plaintiffs-Appellants,

—against—

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, THE STATE OF NEW YORK, THOMAS J. DELANEY, EDWARD A. PICHLER, and ANDREW R. TYLER,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF FOR DEFENDANT-APPELLEE FIDELITY AND DEPOSIT COMPANY OF MARYLAND

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BRIEF FOR DEFENDANT-APPELLEE FIDELITY AND DEPOSIT COMPANY OF MARYLAND

Questions Presented

1. Did the Court below correctly dismiss the alleged Constitutional claims?

2. Did the Court below correctly dismiss the alleged damage claim?

Statement of the Case

The complaint herein contains two claims: that the enforcement of certain sections of the New York Judiciary Law is unconstitutional and that defendant, Fidelity and Deposit Company of Maryland, (hereinafter referred to as "F & D") perpetrated a fraud upon plaintiffs Daniel H. Overmyer and Shirley Overmyer (hereinafter collectively and individually referred to as "Overmyer"). The complaint seeks declaratory and injunctive relief, and damages in the sum of $100,260.00.

Upon motion of F & D, United States District Judge Milton Pollack, in the Southern District of New York, dismissed the complaint by an unreported memorandum and order dated October 18, 1976.

By stipulation and order dated September 7, 1976, defendants the State of New York, and Andrew R. Tyler, were granted an indefinite extension of time to answer, and are not parties to this appeal. Defendant Edward A. Pichler has not appeared, and defendant Thomas J. Delaney has requested that his name be removed from the docket of this appeal.

Statement of Facts

The only facts which are relevant to the issues before this Court are as follows.

There are two main claims alleged in the complaint in this action: a constitutional claim and a claim for fraud damages against F & D. The fraud claim arises out of certain alleged acts of F & D in Texas in 1973, in connection with an action in the Texas State Courts entitled "Eliot Realty, Inc. v. Overmyer Distribution Services, Inc." The constitutional claim arises out of an action in

the Supreme Court of the State of New York, entitled "Fidelity and Deposit Company of Maryland v. Daniel H. Overmyer, Shirley Overmyer, and Overmyer Distribution Services, Inc."

The Texas Action

In 1973, Eliot Realty, Inc. brought an action against Overmyer Distribution Services, Inc., to recover possession of real property, and recovered a judgment awarding the relief sought. Overmyer Distribution Services applied to F & D, which in reliance upon a general agreement of indemnity executed by Shirley and Daniel H. Overmyer, and upon the application of Overmyer Distribution Services, executed an appeal bond, and Overmyer Distribution Services thereafter perfected its appeal to the County Court of Dallas County, Texas. That Court affirmed the judgment below (A81), and also awarded to Eliot Realty, Inc., the value of the continued occupancy of the premises during the appeal in the sum of $28,092.25 (A81). The County Court further directed that execution be had against Overmyer Distribution Services, Inc., and F & D.

Thereafter, on December 7, 1973, F & D paid to Eliot Realty, Inc., the sum of $25,535.85, in discharge of its liability on said bond and in satisfaction of the judgment rendered against it.

The New York Action

F & D thereafter commenced an action for indemnity in the Supreme Court of the State of New York, County of New York against Daniel H. Overmyer, Shirley Overmyer and Overmyer Distribution Services. It is quite apparent from the complaint (A2-A16) that the facts alleged in this action, in paragraphs 12-18 of the complaint herein, arise from the same facts and circumstances al-

leged in the complaint in the New York Supreme Court action.

In the New York action the defendant moved to dismiss the plaintiff's complaint and the plaintiff cross-moved for summary judgment. As evidenced by the affidavit of the defendant's attorney, Stanley Alex Schwartz (A91-A98), sworn to the 23rd day of July, 1974, defendant's attorney specifically challenged the "good faith" of the plaintiff and the payment made by the plaintiff, alleging that there was an issue of fact "as to whether the surety company properly paid over to the party" (A95).

The Supreme Court of New York per Justice Nathaniel Helman held that the defendant's argument was clearly specious and in an opinion dated October, 1974 (A99-A101), the Court stated in pertinent part:

> "No question exists as to plaintiff's obligation when it is named as a judgment debtor and execution is granted against it. This is not a case where it was solely the surety. In any event, defendants contracted to indemnify upon payment, whether plaintiff was liable for that payment or not. Defendants have no defense against their contract obligation, and their attorney cannot create one by "surmise, conjecture and suspicion" (Shapiro v. Health Insurance Plan of Greater New York, 7 N Y 2d 56)."

An order of the Supreme Court of New York was made on November 14, 1975, denying the defendant's motion to dismiss the complaint and granting plaintiff's cross-motion for summary judgment (A102-A105).

On November 19, 1974 pursuant to an order of Justice Nathaniel T. Helman granting it summary judgment, F & D entered judgment against Daniel H. Overmyer,

Shirley Overmyer and Overmyer Distribution Services, Inc., jointly and severally for the sum of $27,973.83.

Overmyer appealed from the judgment entered November 19, 1974, to the Appellate Division, First Department where the judgment was affirmed unanimously on May 20, 1975. Overmyer moved in the Appellate Division for a stay of enforcement which motion was denied, and then moved to reargue the motion for a stay, which was also denied.

Overmyer moved for leave to appeal to the Court of Appeals, first in the Appellate Division and then in the Court of Appeals, both of which motions were denied.

Overmyer then applied to the United States Supreme Court for an extension of time to petition for a writ of certiorari, which application was denied. Overmyer has therefore exhausted his appeals from the judgment.

During the pendency of those appeals, Overmyer also moved in the Supreme Court, New York County, for a stay of enforcement pending the appeal, and to vacate the judgment upon the newly discovered evidence, to wit that the defendants were now claiming that they were not certain that they signed the indemnity agreement. Both of these motions were denied.

After the entry of judgment on November 19, 1974, a subpoena to examine Daniel H. Overmyer as to his assets and earnings was duly prepared and served upon him, requiring his attendance on January 17, 1975 at the offices of this firm. At the request of Overmyer's attorneys, his appearance was adjourned to March 17, 1975. At that time, Overmyer failed to appear for examination and his default was duly noted on the subpoena.

Judgment creditor then brought on a motion on notice to punish Overmyer for contempt, for failure to obey a

lawful subpoena. Notice of this motion was personally served upon Overmyer. On the return date of the motion, May 6, 1975, Overmyer appeared by his attorneys and submitted papers in opposition to the motion. Justice George Postel granted that motion and found Overmyer in contempt of Court unless Overmyer appears for an examination on June 12, 1975. A copy of Justice Postel's order with notice of entry was duly served upon Overmyer's attorneys. On June 12, 1975 Overmyer failed to appear at the appointed time and place. On September 9, 1975, this firm served notice on Overmyer's attorneys that a Contempt Order would be submitted to Justice Postel on September 15, 1975. On September 30, 1975 Justice Postel signed an order adjudging Overmyer to be in contempt of Court and imposed a fine of $260.00, but directed that the Contempt Order be purged and the fine remitted if Overmyer appears for examination on October 29, 1975. A copy of the Contempt Order with notice of entry was duly served by mail upon Overmyer and his attorneys.

Overmyer demonstrated his receipt of the Contempt Order and also his contempt for the judicially imposed fine by making regular payments in the sum of $25.00 per month commencing on October 16, 1975 until the amount of the fine was paid in full. On October 29, 1975 Overmyer failed to appear at the appointed time and place.

On January 21, 1976, Justice Irving Kirschenbaum signed an order to show cause directing Overmyer to show cause on February 3, 1976 "why an order should not be made directing the Sheriff of any County of the State of New York wherein Daniel H. Overmyer may be found to apprehend said Daniel H. Overmyer, the judgment debtor and compel him to appear at Special Term Part II for examination under oath by the judgment creditor." Over-

myer's attorneys appeared and submitted papers in opposition to this motion. However, the motion was granted. On June 2, 1976, pursuant to a decision dated April 30, 1976, an order was made adjudging Overmyer in contempt of Court directing him to appear for examination and directing that "the Sheriff of any County to whom a certified copy of this order shall be delivered, shall forthwith, on receipt thereof, and without further process, apprehend the said Daniel H. Overmyer, the judgment debtor herein, and compel him to appear at a Special Term, Part II of this Court, at the Courthouse, 60 Centre Street, New York, New York, for examination under oath by the judgment creditor herein at 10:00 A.M. on June 10, 1976." A copy of this order was duly served upon Overmyer and his attorneys.

On June 7, 1976 Overmyer, by his attorneys, obtained a stay of the enforcement of the judgment and an order directing F & D to show cause why Overmyer should not be granted leave to reargue the prior motion. This office appeared at the appointed time and after hearing the arguments of both sides, Justice Andrew Tyler denied Overmyer's motion for leave to reargue, by a decision dated June 23, 1976. By order dated August 2, 1976, Justice Tyler vacated the stay imposed on June 7, 1976 and again directed that Overmyer appear for examination and further directed that "the sheriff of any county to whom a certified copy of this order shall be delivered, shall forthwith, on receipt thereof, and without further process, apprehend the said Daniel H. Overmyer, the judgment debtor herein, and compel him to appear at a Special Term Part II of this Court, at the Courthouse, 60 Centre Street, New York, New York, for an examination under oath by judgment creditor herein, at 10:00 a.m. on August 31, 1976, or any court day thereafter until the said Daniel

H. Overmyer shall actually be examined under oath by judgment creditor herein."

Shortly thereafter, Overmyer commenced this action in the District Court.

Response to Overmyer's Statement of Facts

The alleged facts set forth in the plaintiffs-appellants' brief herein are conspicuously devoid of support in the Record on Appeal and the Appendix. In tacit acknowledgement of this, there appears not one reference in the Statement of Facts to the Record or Appendix. In the Court below, Overmyer submitted no affidavits in support of the frivolous and ridiculous allegations of his complaint. The unsupported statement of Overmyer's knowledge, ignorance, intentions, fears, and suspicions should therefore be stricken from the appeal.

Further, the appellant makes the absurd argument that F & D committed acts of bribery and deceit just for the privilege of paying this Texas judgment and incurring the enormous expense and frustration in seeking to recover the payment from the appellant. Rather than having made a "voluntary payment" to Eliot Realty, plaintiff in the Texas action, as a consequence of its suretyship, F & D was threatened with a levy against *its* assets by Eliot Realty, and suffered the entry of judgment against it (A81).

F & D takes this opportunity to go beyond the record, to categorically deny any impropriety or fraud in its handling of the Texas action, or its prosecution of the New York action.

In addition, F & D has never moved to have Overmyer arrested, or imprisoned, but only to compel him to appear

to answer questions, pursuant to a lawful subpoena and several lawful orders of the Supreme Court of the State of New York.

Finally, the Overmyer Statement of Facts attempts to confuse the two separate claims in this case: (1) whether the State of New York may compel compliance with a lawful subpoena and orders of the court, after contempt of those legal processes has been shown, admitted and adjudicated on notice and after hearing from the contemnor; and (2) whether F & D perpetrated a fraud upon Overmyer. These two claims must be separated for proper analysis.

POINT I

The Court below correctly dismissed the alleged constitutional claims.

A. Constitutional argument.

Overmyer's alleged constitutional claim is that he is threatened with incarceration by virtue of the unconstitutional New York Judiciary Law, Article 19. Reliance is placed principally on *Vail* v. *Quinlan*, 406 F. Supp. 951 (S.D.N.Y. 1976). It is respectfully submitted that this reliance is misplaced, as the facts and legal arguments in *Vail* are clearly distinguishable from Overmyer. Therefore, Judge Pollack's decision was correct and merits affirmance.

In this action, Overmyer sought permanent and preliminary injunctions (A15-A16) restraining the enforcement of an order of the Supreme Court of the State of New York, by Justice Andrew R. Tyler, dated August 2, 1976, which provided in pertinent part:

> ". . . Daniel H. Overmyer . . . be and he hereby is directed . . . to appear at a Special Term Part II of this Court, at the Courthouse, 60 Centre Street, New York, New York, for examination under oath by judgment creditor herein, at 10:00 am. on August 31, 1976, and it is further
>
> "ORDERED, that the Sheriff of any county to whom a certified copy of this order shall be delivered, shall forthwith, on receipt thereof, and without further process, apprehend the said Daniel H. Overmyer, the judgment debtor herein, and compel him to appear at a Special Term, Part II of this Court, at the Courthouse, 60 Centre Street, New York, New York, for examination under oath by judgment creditor herein, at 10:00 a.m. on August 31, 1976, or any court day thereafter until the said Daniel H. Overmyer shall actually be examined under oath by judgment creditor herein."

Overmyer claimed that he was entitled to this relief under *Vail* v. *Quinlan*, 406 F. Supp. 951 (S.D.N.Y. 1976) a class action, in which the enforcement of New York Judiciary Law, Article 19 was enjoined as unconstitutional. Logically, plaintiff was either a member of the class of plaintiffs in *Vail*, or he was not such a member. In either case, he was not entitled to the relief sought.

If Overmyer was within the class of plaintiffs represented by Harry Vail, then enforcement of Justice Tyler's order may proceed. Overmyer had no greater right than the other members of the class, against whom enforcement may proceed by virtue of the order of the Supreme Court of the United States by Justice Thurgood Marshall, dated February 12, 1976 (A55). By this order the enforcement of the injunction granted by the District Court was stayed pending the determination of the appeal. As a result, if

Overmyer was a member of the class of plaintiffs in *Vail*, he was not entitled to any relief in the District Court, pending determination of the appeal in *Vail*.

If Overmyer was not a member of the class of plaintiffs in *Vail*, then he was required to prove his entitlement to injunctive relief by reference to applicable law. Judge Pollack correctly found no such applicable law, and that *Vail* provided no support for Overmyer's claims. It is clear that the operative facts in this case are substantially dissimilar to the facts in *Vail*.

The plaintiffs in *Vail* at the inception of the lawsuit, moved to convene a three judge court pursuant to 28 USC §§ 2281 and 2284. Judge Cannella granted this motion, upon a finding that the constitutional issues were substantial. 387 F. Supp. 630 (SDNY 1975). Judge Cannella described the class of plaintiffs who raised substantial constitutional questions regarding the New York procedure for enforcement of judgments as follows:

> "Each plaintiff (as well as the proposed plaintiff-intervenor) is a judgment debtor who has failed to respond to or comply with a post-judgment discovery subpoena. Each has been served with an order to show cause requiring that he demonstrate why he should not be adjudged in contempt of court for failure to obey such subpoena and each has failed to appear at the show cause hearing. Accordingly, each was adjudged in contempt of court and, upon failure to pay the fine specified by the County Court in its contempt order, has been incarcerated or subjected to an immediate threat of incarceration pursuant to an ex parte commitment order issued in compliance with § 756 of the Judiciary Law."

The facts in *Vail*, as recited by Judge Cannella, were crucial to the three judge court's determination of unconstitutionality, and since the most compelling facts were absent from the case at bar, Overmyer was not entitled to relief: (1) Overmyer appeared by attorney, in response to the order to show cause, and contested the issue of contempt. (2) Overmyer was found in contempt of court after this hearing. (3) Overmyer paid the fine of $260.00 specified by the Court; Justice Tyler's order was not based upon Overmyer's failure to pay this fine, but upon his failure to comply with a lawful subpoena and two court orders. (4) Overmyer was and is not subject to incarceration, but only to being compelled to testify. (5) The order compelling his appearance to testify was obtained on notice, after hearing and rehearing, not *ex parte*. Because of the factual dissimilarity of *Vail* and Overmyer, no relief to Overmyer was warranted.

The principal legal bases of the *Vail* decision were three: (1) That the statutes provided for punishment for civil contempt rather than coercion to enforce the court orders. (2) That the statutory scheme did not require that sufficient notice be given to the contemnor of the possibility of incarceration, and (3) That the plaintiffs were deprived of their right to counsel. None of these three bases applies herein to support plaintiff's claims for relief.

The Court in *Vail* stated:

> "Finally, although it is well established that judicial sanctions in civil contempt are proper to compensate the complainant for losses sustained or to coerce compliance with a court's order, the sanctions imposed under the challenged statutes are neither remedial nor coercive, but punitive."

It is clear that Justice Tyler's order is coercive and not punitive. It orders that Overmyer appear for examination (pursuant to subpoena and subsequent court orders) and directs the Sheriff to compel him to appear for such examination. This is clearly remedial in nature and there is no punishment involved.

In *United States* v. *United Mine Workers of America*, 330 U.S. 258 (1947) cited by the Court in *Vail*, a civil (and criminal) contempt proceeding, the Supreme Court held that it was a proper use of contempt proceedings to coerce compliance with a court order, in that case an injunction against a coal miners' strike (330 U.S. at 303-304). Justice Douglas, in his concurring opinion, discussed the long history of contempt proceedings, and observed "Where the court exercises such coercive power, however, for the purpose of compelling future obedience, those imprisoned carry the keys of their prison in their own pockets" (330 U.S. at 331). This is true also of Overmyer: he need only submit to examination under oath, for his contempt to be purged.

Thus, Justice Tyler's order which is plainly aimed at coercing plaintiff to comply with the subpoena and subsequent court orders, does not place an unconstitutional burden upon plaintiff, and no injunction is warranted.

Unlike the plaintiffs in *Vail*, plaintiff Overmyer received effective notice at every stage in the contempt proceeding and actually knew at all times of the sanctions that could be imposed for contempt. Despite this notice and knowledge, Overmyer continued to ignore the subpoena and court orders and wilfully and contumaciously refused to appear for examination. Justice Tyler, in his memorandum decision dated June 23, 1976, stated:

> "This Court finds the litany of evasion and noncompliance in which the defendant judgment debtor

> has engaged to be absolutely incredible. The utter disrespect which Overmyer has shown, not just for the prior order of this Court, but for the entire system of jurisprudence by which this Court and this society operates is reprehensible."

Justice Tyler's above stated opinion was upon a motion, made *on notice* to Overmyer and his attorneys, to compel him to appear for examination. Therefore, the claim of lack of notice and lack of due process, upheld in *Vail*, is irrelevant, because Overmyer was given effective notice at every step.

Finally, unlike the plaintiffs in *Vail*, Overmyer may not claim that the contempt proceedings deprived him of his right to counsel. Overmyer was represented in the Supreme Court action by Easton & Echtman, P.C., his attorneys herein, who appeared and opposed every application made by F & D culminating in Justice Tyler's order of August 2, 1976.

In summary, none of the factual or legal elements which compelled the Court in *Vail* to enjoin the contempt proceedings therein, apply to warrant any relief to Overmyer. For that reason, Judge Pollack's dismissal of the alleged constitutional claim was correct.

B. *Res judicata.*

No reversal of Judge Pollack's decision in the Court below is warranted because of the above-stated lack of constitutional merit, and because these parties have already litigated these constitutional issues in the Supreme Court of the State of New York. Justice Tyler determined the constitutional claims adversely to Overmyer, and no direct attack on his decision has been sustained. Overmyer may not be heard herein to collaterally attack Justice Tyler's determination.

In the Supreme Court, in opposition to F & D's motion for the order challenged herein, Overmyer's attorney submitted an affirmation (A57-A59) which cited and explained the applicability of *Vail* v. *Quinlan*, and urged that the court deny F & D's motion. Justice Tyler granted the motion over this constitutional objection.

Overmyer nevertheless seeks to again "have their day in court to litigate the constitutional issues herein," upon the ground that their (admitted) assertion of a constitutional claim based on *Vail* v. *Quinlan*, in the Supreme Court and the rejection of this claim by (defendant) Justice Tyler, is not a bar to assertion of the claim in Federal Court because it was not determined "on the merits." First, this is not true: Justice Tyler rejected the constitutional claim on the merits. Second, plaintiffs are barred in any event from relitigating this claim by the principle of *res judicata*.

In his memorandum decision dated May 24, 1976, Justice Tyler granted F & D's motion, and directed the Sheriff to apprehend Overmyer and compel him to appear for examination. Justice Tyler stated "It is the contention of Overmyer that the *Vail* decision precludes the grant of the instant motion, and it must therefore be denied as a matter of law." Justice Tyler then cited *Walker* v. *Walker*, — AD2d —, 381 NYS2d 311 (2d Dept., 1976) and held with respect to *Vail*, "nor does it apply to the case at bar."

In *Walker*, *supra*, the contemnor sought to avoid imprisonment, based on *Vail*. The Appellate Division observed:

> "Here, appellant received all of the due process rights which were denied to the plaintiff in Vail. He had been previously imprisoned for violation of the alimony judgment, he was served with proper

> process bringing on this proceeding and he was represented by counsel who appeared and argued on his behalf. Thus, all of the alleged infirmities in the statutes held unconstitutional in Vail are not here applicable. The court there was dealing with a defaulting, impecunious debtor who did not appear at the statutorily guaranteed hearing, who was without any knowledge of the possible consequences to him and who had no counsel. The facts here are the opposite."

Thus, it is clear that Justice Tyler reached the same conclusion as the Court reached in *Walker,* that Overmyer was not protected by *Vail,* because of differences in the factual circumstances. Therefore, this determination of Overmyer's constitutional claims was based on consideration of the facts and the law, and was on the merits, conclusively binding Overmyer, and barring the reassertion of the constitutional claims in this action.

The purpose of the principles of collateral estoppel and *res judicata,* is to safeguard the finality of litigated determinations, and to protect parties from repetitive and vexatious litigation. Plaintiff and F & D have already litigated the fact of Overmyer's contempt, and the proper remedy therefor, and this litigation has resulted in a final order reinstated after reargument, from which no appeal has been taken. As set forth above, plaintiffs raised, and the court decided the constitutional issue. Since the same question of constitutionality was at issue and was determined against Overmyer in state Court, *res judicata* bars the relitigation of that issue in Federal Court. *Thistlethwaite* v. *City of New York,* 362 F. Supp. 88 (S.D.N.Y. 1973), *aff'd* 497 F2d 339 (2d Cir.), *cert. den.* 419 U.S. 1093 (1974). See also Judge Pollack's discussion of this issue (A139-A140).

Therefore, Overmyer's alleged constitutional claim is barred by *res judicata* as well as its lack of merit, and Judge Pollack's dismissal was correct and merits affirmance.

POINT II

The Court below correctly dismissed the alleged damage claims.

It is respectfully submitted that Judge Pollack's dismissal of Overmyer's claim for damages suffered as a result of the alleged fraud of F & D, was correct because the claim was abandoned, because there is no subject matter jurisdiction of the claim in Federal Court, and because the claim is barred by the operation of *res judicata*.

A. Abandonment.

Overmyer's claim for fraud damages set forth in the complaint herein as a Fifth Cause of Action (A14-A15) was not urged by Overmyer before Judge Pollack. Therefore, the dismissal of the claim was proper, and the claim may not be renewed herein.

Examination of the Appendix herein as well as the Record, reveals that, at no time, after the initial pleading, did Overmyer support the claim for damages, or request that the damage claim be considered by the Court, or oppose F & D's motion to dismiss the damage claim. Although Overmyer's brief on this appeal seeks to present the facts of the damage claim in the context of a constitutional claim, no discussion of the damage issue was required or appropriate in the papers concerning the motion for a preliminary injunction in the district court (A23-A36, A60-A71). The affidavit of Arthur Lambert (A74-

A80) and the exhibits annexed thereto (A81-A85) in support of F & D's motion to dismiss the complaint, are largely addressed to the damage claims, and set forth the basis for the argument that *res judicata* bars relitigation of the damage claims. Point I and much of Point II of F & D's Memorandum of Law in Support of Motion to Dismiss (A106-A112) is also directed toward dismissal of the damage claim. Overmyer's memorandum of law (A114-A120) submitted in opposition to the motion to dismiss does not argue that the damage claim should be sustained. In fact, Overmyer concludes (A120): "it is respectfully submitted that defendant Fidelity's motion to dismiss be denied and that plaintiffs' have their day in court *to litigate the constitutional issues herein*" (emphasis added). It must be implied from the foregoing that Overmyer abandoned the claim for damages in the district court. Thus the dismissal of the claim for damages was proper and correct, and should not be reversed on this appeal.

B. Lack of subject matter jurisdiction.

The claim for damages by plaintiffs against F & D relates exclusively to the conduct of F & D in an action in Texas and in a subsequent action in New York. (Complaint, Paragraphs 12-18, A5-A9). No diversity of citizenship is alleged (A3), nor is any federal question presented by this claim. A Federal Court therefore has no jurisdiction to adjudicate this claim, except as an appendage to a claim over which the Federal Court *has* subject matter jurisdiction. It is respectfully submitted that no pendent jurisdiction exists, and that Judge Pollack's dismissal of the damage claim, therefore should be affirmed.

Assuming for the purposes of argument that Overmyer's alleged constitutional claim presents a federal question, the claim for damages is not sufficiently related to

the constitutional claim to be within the Federal Court's subject matter jurisdiction. The constitutional claim arises from plaintiff Daniel H. Overmyer's contempt of the Supreme Court of the State of New York, and the orders and lawful processes thereof. All of the facts relating to the constitutional claim occurred in New York, in or after November, 1974, when a lawful subpoena to Overmyer was issued out of the Supreme Court of the State of New York. The alleged basis of the claim for damages is in conduct of F & D in Texas, in 1973 and in New York, prior to November, 1974. Thus there are no material facts common to the two claims.

The standard by which Federal Courts judge whether pendent jurisdiction exists is whether the two claims "derive from a common nucleus of operative fact." *United Mine Workers of America* v. *Gibbs,* 383 US 715 (1966). It is clear from the foregoing that plaintiffs' damage claim hereunder arises from facts which are entirely separate from the facts relating to plaintiff's constitutional claim. For that reason, the claim for damages against F & D were correctly dismissed for lack of subject matter jurisdiction.

C. The bar of *res judicata.*

An additional, independent ground for affirmance of Judge Pollack's dismissal of the damage claim, is that the damage claim was barred by the principle of *res judicata.* The same parties to the damage claim, F & D and Overmyer, were parties in a prior action entitled: "Fidelity and Deposit Company of Maryland v. Daniel H. Overmyer, Shirley Overmyer, and Overmyer Distribution Services, Inc." which was fully and fairly litigated, and which resulted in a conclusive and final judgment in favor of F & D and against Overmyer. The damage claims asserted herein are merged into that judgment.

In this action, Overmyer merely rephrases the claims that F & D paid Eliot Realty, Inc. in bad faith, which was fully litigated and determined in the Supreme Court, New York County. This defense which was found to be without merit, was recast herein as a claim for damages, seeking to reverse the liability and judgment lawfully imposed upon Overmyer. This action is no more than a collateral attack on the judgment, after all direct attacks by way of appeals and by motions to vacate have failed. Therefore, this claim was correctly dismissed.

In *Saylor* v. *Lindsley,* 391 F.2d 965 (2d Cir. 1968). Judge Anderson described the elements of *res judicata* as follows:

> "The general rule of res judicata is that a valid, final judgment, rendered on the merits, constitutes an absolute bar to a subsequent action between the same parties, or those in privity with them, upon the same claim or demand. *It operates to bind the parties both as to issues actually litigated and determined in the first suit, and as to those grounds or issues which might have been, but were not, actually raised and decided in that action.* The first judgment, when final and on the merits, thus puts an end to the whole cause of action. See Cromwell v. County of Sac, 94 U.S. 351, 24 L.Ed. 195 (1877); Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597, 68 S.Ct. 715 92 L.Ed. 898 (1948); 1B Moore's Federal Practice ¶0.405 [1] (1965 ed.).
>
> "The requirement that a judgment, to be res judicata, must be rendered 'on the merits' guarantees to every plaintiff the right once to be heard on the substance of his claim." (Emphasis added) 391 F.2d at 968.

Each aspect of this test is met here.

The Supreme Court has observed that the principles of *res judicata* "as founded upon the generally recognized public policy that there must be some end to litigation and that when one appears in Court to present his case, is fully heard, and the contested issues decided against him, he may not later review the litigation in another court" *Heiser* v. *Woodruff*, 327 U.S. 726, 733 (1946).

Because the issues in the damage claim were conclusively determined against Overmyer prior to the institution of this suit, the dismissal of the damage claim was correct, and should be affirmed.

POINT III

Appellant's brief raises no grounds for reversal of the Court below.

Overmyer's brief on this appeal discussed a number of constitutional issues which are totally foreign to the facts in the record herein. By attempting to confuse and intermingle the constitutional and damage claims, Overmyer attempts to evoke the sympathy of this court, which effort is misplaced. The brief fails to raise any basis for the reversal of Judge Pollack's sound and well reasoned opinion.

The argument that the New York Judiciary Law Sections challenged by Overmyer are unconstitutional on their face is irrelevant. To the extent that *Vail* v. *Quinlan*, 406 F. Supp. 951 (1975) is correct, the procedure provided by those statutes which does not require notice prior to incarceration, may be unconstitutional. However, F & D employed a different procedure, acted under a different statute, and does not seek to incarcerate Over-

myer, therefore, Overmyer will not be heard to raise any constitutional objection herein.

The procedure employed by F & D in enforcing a lawful subpoena, gave actual notice to Overmyer at every stage. In fact Overmyer appeared and opposed the original motion to hold him in contempt. F & D thereafter made a motion, on notice to Overmyer, for an order directing the Sheriff to compel Overmyer to appear for examination, which motion was granted over Overmyer's objection. Overmyer then sought and obtained reargument, after which the prior order was reinstated. The procedure described in *Vail, supra* allows an order to incarcerate the debtor to be granted *ex parte*, but F & D made the latest motion on notice. Second, as correctly observed by Judge Pollack, New York CPLR 2308, which provides in pertinent part, "A court may issue a warrant directing a Sheriff to bring the witness into court" was the basis of F & D's motion herein, not the Judiciary Law. Finally, the order challenged herein did not provide for incarceration, only compulsion to appear to answer questions under oath, pursuant to a lawful subpoena, and orders of the Court. Thus, whether or not the statutory scheme provided by the Judiciary Law is constitutional, the proceedings against Overmyer in the Supreme Court of the State of New York are clearly constitutional.

Overmyer's second argument on this appeal, entitled "The New York Statutes are unconstitutional as applied" to the extent it is intelligible sets forth two propositions: that F & D by its alleged fraud in Texas, denied Overmyer due process of law; and that Overmyer was denied the opportunity to contest his "incarceration." These propositions are irrelevant to the facts of this case, are illogical on their face, and are simply untrue. In this action, the fraud claim is separate from the constitutional claim, and no injunction against fraud is sought, only against the

enforcement of the contempt laws. Second the fraud claim is based on the improbable premise that F & D engaged in acts of fraud and overreaching, in order to enable itself to pay approximately $25,000 to its customer's adversary, in return for the right to sue its customer for an equal amount. This is nonsensical. Finally, Overmyer had at least three opportunities to show that he should not be held in contempt, and at each opportunity he was actually heard: on May 6, 1975 before Justice George Postel; in early 1976 before Justice Andrew Tyler, and in June, 1976, upon reargument before Justice Tyler. Thus Overmyer's second point cannot be the basis for reversal herein.

Overmyer's third argument, that his constitutional claims are substantial, is incorrect. The constitutional claim may be aptly characterized as "essentially fictitious"; "wholly insubstantial"; "obviously frivolous"; "obviously without merit." *Goosby* v. *Osser*, 409 U.S. 512 (1973). Judge Pollack, below, stated "Plaintiffs do not satisfy the criteria for injunctive relief . . . by raising a semantic semblance to an irrelevant constitutional question" (A138). Thus, no substantial constitutional issue is present in this case.

Overmyer's fourth argument, regarding his individual right to an injunction does not require a reply. The fifth and sixth arguments regarding *res judicata* and collateral estoppel are discussed at length above. Overmyer's last argument, that a preliminary injunction is warranted, is ripe for consideration only upon reversal, and is not, as such, a basis for reversal.

In summary, the arguments and points contained in Overmyer's brief on this appeal, do not amount to cause for reversal of the Court below, and Judge Pollack's order should be affirmed.

CONCLUSION

For all of the foregoing reasons, upon the record and the applicable law, the memorandum and order of Judge Pollack, dated October 18, 1976 should be affirmed, with costs to Fidelity and Deposit of Maryland, defendant-appellee.

Respectfully submitted,

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